PAN NORTHERN AIR SERVICES SDN BHD v. MAYBANK ISLAMIC BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
LEE SWEE SENG JCA
S NANTHA BALAN JCA
[CIVIL APPEALS NO: W-02(MUA)(W)-2512-12-2018
& W-02(MUA)(W)-2522-12-2018]
11 DECEMBER 2020

BANKING: *Islamic banking – Loan facility – Principles for ta'widh – Correct rate applicable – Whether issue ought to be referred to Shariah Advisory Council – Borrower claiming for excess amount of ta'widh paid from bank – Whether limitation set in – Whether there was full accord and satisfaction with payment made barring borrower from claiming refund of excess – Whether an accord and satisfaction subject to reservation of borrower's right to challenge correctness of ta'widh charged – Central Bank of Malaysia Act 2009, s. 56 – Limitation Act 1953, s. 6(1)(a)*

The appellant ('borrower') obtained an Islamic financing facility for the total sum of RM41,016,200 ('the facility') to finance the performance of a contract with the Malaysian Centre of Remote Sensing Agency, Ministry of Science, Technology and Innovation ('the employer'). The borrower had accepted the facility and the *aqad* for the acceptance of the facility has been made to comply with the Shariah requirements. Upon acceptance of the facility, five separate Al-Bai Bithaman Ajil ('BBA') facilities agreements had been executed between the borrower and Malayan Banking Bhd ('MBB'). *Vide* a vesting order dated 12 July 2007, upon a joint application by MBB and the respondent, Maybank Islamic Bhd ('bank') effective from 1 January 2008 by enforcement of laws, all scheme for sale, purchase and transfer of assets and liabilities (including undertakings, contract of assets and liabilities) for Malayan Banking Bhd's Islamic financing businesses was transferred and vested to the bank. Between the years of 2007 to 2013, the borrower had filed and litigated a claim against the employer for non-payment of the contract and wrongful termination of the contract. During these periods, due to the borrower's inability to service the facility, the bank had placed and appointed a receiver and manager into the borrower's company. Upon settlement of the dispute with the employer, the borrower had communicated with the bank to enquire for the settlement of the facility and the bank had *vide* their letter dated 15 March 2013 requested a sum of RM42,045,000 with waiver of *ta'widh* of RM1,000,000 for payment to be made before 30 April 2013 as settlement sum for the facility. *Vide* a letter dated 25 March 2013, the borrower had requested for the details and statement of accounts from the bank for the purpose of checking and records. Upon the borrower's request,

A the borrower received a statement of accounts from the bank *vide* their letter dated 29 March 2013 for the overdraft facility, the BBA-1 facility, the BBA-3 facility and the BBA-4 facility, all of which were undated and prepared manually without any signature or bearing the bank's letterhead. The bank's letter dated 29 March 2013 also reminded the borrower to pay
B RM42,045,000 before 30 April 2013. To comply with the bank's instruction for payment, the borrower *vide* letter dated 15 April 2013 forwarded the payment of RM42,045,000 as at 30 April 2013 for settlement of the borrower's financial obligation with the bank without prejudice to the borrower's right for the correct calculation and statement of accounts, and
C for the return of the *ta'widh* and *ibra'* based on the Shariah principles. The payment was made based on the amount demanded by the bank *vide* their letters dated 15 March 2013 and 29 March 2013. After perusing through the statement of accounts ("the first statement of accounts"), the borrower had *vide* its letter dated 4 April 2013 enquired with the bank on several uncertainties and contradicting issues in the BBA facilities contradicting with
D the Shariah Islamic principles, including but not limited to the uncertainty, variation and differences in the statement of accounts, issue of *ta'widh* and *ibra'* including the calculation of *ta'widh* and *ibra*'. The borrower raised the issue that the *ta'widh* imposed upon the facilities based on the first statement of account was imposed upon the sale price based on various different rates
E between 2.88% to 7.53%. The bank had also stated that the *ta'widh* rates were the then current IIMM (Islamic Interbank Money Market) rate or 'r' rate. Upon checking the published IIMM rate by Bank Negara Malaysia ('BNM'), the borrower found that the IIMM rate represented by the bank in the first statement of account differed and varied from the actual IIMM rate
F published by BNM. The borrower communicated its grievances to the bank but received unsatisfactory and contradicting replies from the bank. The bank gave various excuses and had, upon the borrower's further query, changed their position and stand especially on the *ta'widh* and *ibra'* issues. To resolve the dispute fully and finally, the borrower brought the High Court
G suit against the bank for various reliefs. The High Court dismissed the borrower's claims on grounds that the bank was entitled to charge *ta'widh* at the rates imposed by the bank and that the calculation was correct. The High Court further held that there was accord and satisfaction with the payment of the sum of RM42,045,000 by the borrower, being the amount calculated by the bank and to be paid on or before the date stipulated by the bank with
H the bank giving an RM1,000,000 discount on the *ta'widh*. With that finding, the High Court struck out the bank's counterclaim for the RM1,000,000, which discount on the *ta'widh* would no longer be binding in the event that there was no accord and satisfaction. Aggrieved, the borrower appealed. The bank also appealed against the decision of the High Court, more on an
I abundance of caution, in that, should the borrower succeed in this appeal on its claim for a refund of excess *ta'widh* paid then the bank said it was also

entitled consequentially and correspondingly for a refund of the discount or waiver of RM1,000,000 given for the *ta'widh* charge. The issues that arose were (i) whether the correct rate for *ta'widh* rate is 1% per annum as stated in the asset sale agreements; (ii) whether the issue as to the charging of *ta'widh* should be referred to the Shariah Advisory Council ('SAC') for determination as to whether it was illegal under Shariah; (iii) whether limitation had set in when the borrower claimed for the excess amount of *ta'widh* paid; (iv) whether there was full accord and satisfaction with the payment of RM42,045,000 barring the borrower now claiming a refund of the excess; and (v) whether limitation should run from the date when full payment of the loan was made subject to the right to challenge the *ta'widh* charged.

Held (allowing borrower's appeal)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The pertinent principles for the *ta'widh* charged in the asset sale agreement relevant to this case may be distilled from cl. 9.32: (i) the compensation for *ta'widh* is contracted at the rate of 1% per annum; (ii) the *ta'widh* is calculated from the date of such default until the date of payment of the amount thereof; (iii) the *ta'widh* shall not be limited to the period of the financing; and (iv) the rate of *ta'widh* can be varied upon written notification to the customer. It would be unconscionable for the bank, by a back door method, to introduce a penalty by way of increasing unilaterally the rate for *ta'widh* when there is a default in the schedule of payments. While BNM may have permitted penalty to be charged that is an actual reflection of the loss suffered by the bank, there must first be an enabling provision in the BBA facilities agreements for penalty to be charged. In the absence of such a provision, it would be disingenuous for the bank to impose it under the guise of their IIMM rate or the BNM pro-rated IIMM rate when contractually, *ta'widh* had been fixed at 1% per annum and no written notice had been given to the borrower for its increase. (paras 29 & 49)

(2) If the bank had charged *ta'widh* based on the IIMM rate or 'r' rate on the balance purchase price from the date of termination of the facility agreements *ie*, from 1 May 2008 till 15 April 2013, the amount would be RM6,599,937.01. In fact, the bank actually charged RM7,629,479.92 before giving a discount of RM1,000,000 on the *ta'widh* which was now the subject matter of the appeal by the bank on the striking out of their counterclaim in the High Court. The bank also confirmed that based on the rate of 1% per annum for the same period, the amount worked out to be RM1,594,651.22. Hitherto whenever the rate of 1% per annum was referred to, it had not been stated whether it was on the balance purchase price or on the balance sale price. The 1% per annum of *ta'widh*

should be based on the balance sale price, as if there had not been a default on the full sale price would have been paid upon maturity date. Hence, any failure to pay the schedular instalments payments would require the borrower to compensate the bank based on the balance sale price as at the date of termination of the facility agreement upon default plus the compensation based on the profit that the bank would have earned had the instalments been paid on time as represented in the *ta'widh*. Therefore, the excess *ta'widh* paid was RM5,005,285.79 (RM6,599,937.01-RM1,594,651.22) which amount the bank was ordered to refund to the borrower. (paras 73-76)

(3) Section 56 of the Central Bank of Malaysia Act 2009 clearly envisages two options that the civil courts have when confronted with a request to refer a question to the SAC with respect to a dispute involving an Islamic finance claim. One is to ascertain if there are already existing rulings of the SAC on the question raised and only when there is none, then to refer to the SAC for its ruling. Looking at the issue of *ta'widh* raised, the matter had been addressed in the relevant directions, rulings and resolutions of BNM and the SAC. Thus, if the borrower refers to a ruling of the SAC and submits that it is applicable and the bank submits that it is not or that another ruling is applicable because the factual matrix is different, then it is for the court to interpret the seemingly contradictory rulings or resolutions following the established principles of interpretation. Only when the court is of the view that the matter is novel, in that, existing rulings or resolutions do not deal with the matter or issue at hand would there arise a need to refer to the SAC. This court could not see how the reference to the SAC would throw fresh light on the issue of the imposition of *ta'widh* in the factual matrix of this case. The borrower seemed to have abandoned this issue of the need to refer to the SAC as this court had decided on what was the proper calculation of the *ta'widh* and the borrower had not appealed against this decision. The bank and the High Court had taken the view that there was no need to refer the issue of *ta'widh* to the SAC. (paras 83-84, 87-88, 94 & 95)

(4) Under s. 6(1)(a) of the Limitation Act 1953, the borrower has six years to bring his action against the bank under contract as represented by the facilities agreements from the date the cause of action accrued. The bank was acting in compliance with the Shariah principle that since the default was not a case where the borrower had wilfully refused to pay but rather that it could not as the Government of Malaysia had wrongfully terminated their contract with them and there were no payments made by the Government of Malaysia until the matter was taken to arbitration and an award was handed in its favour. The borrower wasted no time in paying the bank and did so on 30 April

2013, some three months after the award, subject to terms. As the award was delivered around 19 February 2013, it was well within the six-year limitation period when the borrower brought this action at the High Court on 23 August 2017 (paras 98, 107, 108 & 114)

(5) Whether or not there was a full and unqualified accord and satisfaction, it would have to be determined from the four walls of the cover letter of 15 April 2013 enclosing the cheque for the payment of RM42,045,000. It was crystal clear that the payment was subject to the reservation of the borrower's right to a full refund of the excess payment after taking into account the *ta'widh* that could be validly charged. A fresh contract had come into being with a new consideration in that the bank would not need to sue for the loan outstanding plus proper and valid *ta'widh* charged and the borrower in turn got a release of all mortgages and charges as well as the uplifting of the receivership with the reservation of its right to claim for a refund of the excess *ta'widh* paid. The words 'Without Prejudice' were capitalised just in case the bank might be tempted to overlook it and the payment was strictly without prejudice to its right and remedy available in law in respect of the *ta'widh*. The bank accepted the cheque which cleared and by so doing, the bank was deemed to have accepted the terms upon which the payment was made. In fact, in their letter dated 17 April 2013, the bank had expressly stated that they were receiving the cheque on a without prejudice basis, which was a tacit, if not, an express recognition that they had accepted the payment on the terms stipulated by the borrower, *ie*, that it was paid on a without prejudice basis. There was no room for estoppel to apply to prevent the borrower from suing for the excess *ta'widh* paid for that right had been categorically carved out, expressly reserved and properly preserved. It was a compromise that came with a reservation of the borrower's right. It was an accord and satisfaction subject to the reservation of the borrower's right to challenge the correctness of the *ta'widh* charged and to claim for a refund of the excess. (paras 115, 118, 119, 120, 122, 123, 136 & 137)

(6) The borrower was within time to bring this action for a refund of the excess *ta'widh* paid as the payment of the settlement sum was subject to the term that the borrower would be contractually allowed to claim for a refund of the excess as may be decided by a court of law. The bank was fully conscious of and consented to receiving the full settlement sum subject to the limited right of the borrower to challenge the correctness and legality of the amount of *ta'widh* charged. This was not a case of unqualified and unequivocal accord and settlement whichever way one may want to read the terms of settlement found in the cover letter to the cheque for the settlement sum. True, the borrower could not set aside the whole settlement but that it could dispute the amount of *ta'widh*

charged for that right was clearly spelt out. It was not unlike a payment under protest subject to its right to challenge the legality and amount of *ta'widh* charged. By accepting the payment made, there was a fresh contract entered into which gave the borrower the right to challenge the *ta'widh* charged within six years from the date of payment. That right to sue for a refund of the excess *ta'widh* arose when the payment, subject to terms, was accepted by the bank. This action for recovery of the excess amount of *ta'widh* paid being made on 23 August 2017 was well within six years from the date of the payment made on 30 April 2013. (paras 138-139, 141 & 142)

Case(s) referred to:

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors [2015] 9 CLJ 422 CA ***(refd)***

CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor [2019] 2 CLJ 1 FC ***(refd)***

Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(refd)***

JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 5 CLJ 569 FC ***(refd)***

Kerajaan Malaysia v. KCSB Konsortium Sdn Bhd [2019] 1 LNS 837 HC ***(refd)***

Kong Ming Bank Bhd v. Sim Siok Eng [1982] 1 LNS 12 PC ***(refd)***

Kuwait Finance House (Malaysia) Bhd lwn. Teknogaya Diversified Sdn Bhd & Yang Lain [2012] 1 LNS 233 HC ***(refd)***

Maybank Islamic Bhd v. M-10 Builders Sdn Bhd & Anor [2017] 7 CLJ 127 CA ***(refd)***

Mohd Alias Ibrahim v. RHB Bank Bhd & Anor [2011] 4 CLJ 654 HC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Peng Bee Sdn Bhd v. Teoh Liang Teh & Ors [2000] 4 CLJ 825 CA ***(refd)***

Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case [2010] 4 CLJ 388 HC ***(refd)***

The Great Eastern Life Assurance Company Limited v. Indra Janardhana Menon [2005] 1 LNS 178 FC ***(refd)***

Legislation referred to:

Central Bank of Malaysia Act 2009, ss. 55, 56, 57

Contracts Act 1950, s. 7(a)

Housing Development (Control and Licensing) Regulations 1989, Schedule G cl. 24(4)

Limitation Act 1953, ss. 4, 6(1)(a), 29

Contract Act 1872 [Ind], s. 7

Other source(s) referred to:

Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 12th edn, vol 1, Butterworths, 2001, p 199

Visu Sinnadurai, *Law of Contract*, 4th edn, vol 1, para 2.19

For the appellant - Sukhdev Singh Randhawa & Muhamed Fariz Mohd Ali; M/s Azlan Shah Sukhdev & Co

For the respondent - Andrew Chiew Ean Vooi & Mong Chung Seng; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22M-198-08-2017 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JCA:

[1] This judgment grapples with the issue of what is the correct *ta'widh* rate that is chargeable under an Islamic banking contract for a loan that was paid after default of the instalment payments and before the maturity date of the loan.

[2] It also deals with the concomitant issue as to whether when a Shariah question is raised on the charging of *ta'widh* should the court invariably have to refer the matter to the Shariah Advisory Council ("SAC") or is it entitled to look at available rulings of the SAC and decide accordingly.

[3] There was also the contractual issue as to when the payment for the outstanding loan was made was there an accord and satisfaction when the borrower said the payment was made subject to the lender charging the right amount for the *ta'widh* said to have been incurred.

[4] When the borrower disagreed with the lender's charging of *ta'widh*, both on the rate and the calculation, it brought an action for recovery of what was allegedly overpaid at which instance the lender raised the defence of limitation having set in.

[5] Correspondingly the lender had counterclaimed for the sum of RM1,000,000 in *ta'widh* as a discount given for the settlement sum paid in the event that the court were to hold that there was no accord and satisfaction.

[6] The High Court dismissed the plaintiff borrower's claim on ground that the defendant bank was entitled to charge *ta'widh* at the rates imposed by the bank and that the calculation was right. The High Court further held that there was accord and satisfaction with the payment of the sum of RM42,045,000 by the borrower, being the amount calculated by the bank and to be paid on or before the date stipulated by the bank with the bank giving a RM1,000,000 discount on the *ta'widh*.

[7] With that finding, the High Court struck out the defendant bank's counterclaim for the RM1,000,000, which discount on the *ta'widh* would no longer be binding in the event that there was no accord and satisfaction.

[8] For ease of reference the borrower which was the plaintiff in the High Court below shall be referred to as the borrower or the appellant and the bank who was the defendant in the High Court shall be referred to as the bank or respondent.

[9] The bank had also appealed against the decision of the High Court, more on an abundance of caution, in that should the borrower succeed in this appeal on its claim for a refund of excess *ta'widh* paid then the bank said it is also entitled consequentially and correspondingly for a refund of the discount or waiver of RM1,000,000 given for the *ta'widh* charge.

[10] Both the appeals were heard together with the arguments taken in the borrower's appeal as the outcome would settle how the bank's appeal is to be decided.

The Financing Facility Agreements

[11] Learned counsel for the borrower had succinctly summarised the key unvarnished facts below with respect to the various Islamic financing agreements and the events leading to the disputes, which narration of the fact we gladly adopt.

[12] The appellant/borrower had *vide* a letter of offer from Malayan Banking Bhd ("MBB") dated 1 August 2005 obtained an Islamic financing facility for the total sum of RM41,016.200 ("the facility") to finance the performance of a contract with the Malaysian Centre of Remote Sensing Agency, Ministry of Science, Technology and Innovation ("the employer").

[13] The borrower had accepted the facility and the *aqad* for the acceptance of the facility has been made to comply with the Shariah requirements.

[14] Amongst the terms of the facility is are follows:

A. FACILITY

Facility	Sub Limit (RM)	Total Limit (RM)
1. *Murabahah* Overdraft		2,000,000
2. Letter of Credit *Murabahah* Sight/usance/local/foreign-180days	}	30,242,000
3. BBA Term Financing-i [1]	18,400,000 }	
4. BBA Term Financing-i [2]	4,300,000 }	
5. BBA Term Financing-i [3]	6,112,000 }	
6. BBA Term Financing-i [4]	955,000 }	
7. BBA Term Financing-i [5]	475,000 }	
8. Islamic Bank Guarantee [Performance]		750,000

9. Islamic Bank Guarantee [Advance Payment]	5,000,000	A
10. Foreign Exchange Contract	30,242,000	
Total (including 10% FEC)	41,016,200	

[15] Upon acceptance of the facility, five separate *ai-bai bithaman ajil* ("BBA") facilities agreements has been executed between the borrower and Malayan Banking Bhd as follows: B

1. *Ai-Bai Bithaman Ajil* [1] ("BBA-1")

   (a) Asset Purchase Agreement dated 15.2.2006 C

   (b) Asset Sale Agreement dated 15.2.2006
   (collectively referred to as "the BBA-1 Facility Agreements")

2. *Ai-Bai Bithaman Ajil* [2] ("BBA-2")

   (a) Asset Purchase Agreement dated 15.2.2006 D

   (b) Asset Sale Agreement dated 15.2.2006
   (collectively referred to as "the BBA-2 Facility Agreements")

3. *Ai-Bai Bithaman Ajil* [3] ("BBA-3")

   (a) Asset Purchase Agreement dated 30.6.2006

   (b) Asset Sale Agreement dated 30.6.2006 E
   (collectively referred to as "the BBA - 3 Facility Agreements")

4. *Ai-Bai Bithaman Ajil* [4] ("BBA-4")

   (a) Asset Purchase Agreement dated 30.10.2006

   (b) Asset Sale Agreement dated 30.10.2006 F
   (collectively referred to as "the BBA - 4 Facility Agreements")

5. *Ai-Bai Bithaman Ajil* [5] ("BBA-5")

   (c) Asset Purchase Agreement dated 30.10.2006

   (d) Asset Sale Agreement dated 30.10.2006 G
   (Collectively referred to as "the BBA-5 Facility Agreements")

[16] The Court of Appeal in *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839 explained a BBA contract as follows:

> [14] A BBA contract is a financial instrument in Islamic banking. It is the most common form of transaction being used in Islamic banking in this country. Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a property purchase agreement and also a property sale agreement. H I
>
> [15] In a typical BBA contract, the customer will first sell the property or asset to the bank under the property purchase agreement. The bank's

purchase price would be the amount required by the customer. That sum is called the facility amount or the financing amount. It is also described as the bank's purchase price.

[16] The sale is a cash sale. The bank has to pay the purchase price to the customer immediately upon the completion of the documentation process. But in most cases, where a customer had entered into a sale and purchase agreement with a developer to purchase a house, and therefore needs financing, the bank and the customer would mutually agree that the bank shall release the amount (the bank's purchase price) to the developer in stages against progress payment certificates.

[17] With that purchase, the property belongs to the bank. But, the customer is to buy it back from the bank and he will only be able to pay the price over a period of years. The bank will sell but the sale price will not be the same amount as the bank's purchase price. The sale price will include the bank's profit on the sale, which will later be calculated and added to the purchase price. The total amount is now the sale price. In effect, the bank will sell the very same property it has purchased from the customer to him at a selling price under the property sale agreement. The customer then will pay the bank's selling price over a period of years by monthly installments. At that point the customer becomes the owner of the property again.

[17] *Vide* a vesting order dated 12 December 2007 under Kuala Lumpur High Court Originating Summons No. D5-24-349-2007 upon a joint application by Malayan Banking Bhd (No. Syarikat: 3813-K) and the respondent, effective from 1 January 2008 by enforcement of laws, all scheme for sale, purchase and transfer of assets and liabilities (including undertakings, contract of assets and liabilities) for Malayan Banking Bhd's Islamic financing businesses was transferred and vested to the respondent.

[18] Between the years of 2007 to 2013, the borrower had filed and litigated a claim against the employer for non-payment of the contract and wrongful termination of the contract. During these periods, due to the borrower's inability to service the facility, the bank had placed and appointed receiver and manager into the borrower's company.

[19] Upon settlement of the dispute with the employer, the borrower had communicated with the bank to enquire for the settlement of the facility and the bank had *vide* their letter dated 15 March 2013 requested a sum of RM42,045,000 with waiver of *ta'awidh* of RM1,000,000 for payment to be made before 30 April 2013 as settlement sum for the facility. No details or any statement of accounts were produced by the bank to the borrower.

[20] *Vide* a letter dated 25 March 2013, the borrower had requested for the details and statement of accounts from the bank for the purpose of checking and records. Upon the borrower's request, the borrower had received a statement of accounts from the bank *vide* their letter dated 29 March 2013 for the overdraft facility, the BBA-1 facility, the BBA-3 facility and the

BBA-4 facility, all of which are undated and prepared manually without any signature or bearing the bank's letterhead. The bank's letter dated 29 March 2013 also reminded the borrower to pay RM42,045,000 before 30 April 2013.

[21] To comply with the bank's instruction for payment, the borrower *vide* its solicitors Messrs Arshad Azhari & Associates's letter dated 15 April 2013 forwarded the payment of RM42,045,000 as at 30 April 2013 for settlement of the borrower's financial obligation with the bank without prejudice to the borrower's right for the correct calculation and statement of accounts, and for the return of the *ta'widh* and *ibra'* based on the Shariah principles. The payment was made based on the amount demanded by the bank *vide* their letters dated 15 March 2013 and 29 March 2013.

[22] After perusing through the statement of accounts ("the first statement of accounts"), the borrower had *vide* its letter dated 4 April 2013 enquired with the bank on several uncertainties and contradicting issues in the BBA facilities contradicting with the Shariah Islamic principles, including but not limited to the uncertainty, variation and differences in the statement of accounts, issue of *ta'widh* and *ibra'* including the calculation of *ta'widh* and *ibra'*.

[23] The borrower has raised that the *ta'widh* imposed upon the facilities based on the first statement of account were imposed upon the sale price based on various different rates between 2.88% to 7.53%. The bank had also stated that the *ta'widh* rates were the then current IIMM (Islamic Interbank Money Market) rate or "r" rate.

[24] Upon checking the published IIMM rate by Bank Negara Malaysia ("BNM"), the borrower found that the IIMM rate represented by the bank in the first statement of account differs and varies from the actual IIMM rate published by BNM.

[25] The borrower had communicated its grievances to the bank but received unsatisfactory and contradicting replies from the bank. The bank gave various excuses and had upon the borrower's further query changed their position and stand especially on the *ta'widh* and *ibra'* issues.

[26] To resolve the dispute fully and finally the borrower as plaintiff brought the High Court suit against the bank as defendant for various reliefs but at the appeal, the borrower had confined the issue to the rate of *ta'widh* charged and a refund of the excess.

Whether The Correct Rate For Ta'Widh Rate Is 1% Per Annum As Stated In The Asset Sale Agreements

[27] We must begin at the beginning which is to look at what the parties had agreed when the contract was entered into. Having established that we would then proceed to consider what had been contended, that any *ta'widh* charged is not in compliance with Shariah principles.

[28] The clause governing when and at what rate *ta'widh* may be charged is set out in section 9.32 of the respective asset sale agreements as follows:

> **Section 9.32 - *Ta'widh***
>
> If the Customer defaults in any payment on its due date of any one or more of the instalments or any other moneys herein covenanted to be paid, *the Customer shall pay to the bank ta'widh (compensation) at the compensation rate of 1% per annum on the overdue instalments calculated from the date of such default until the date of payment of the amount thereof* and shall not be limited to the period of the financing or any method approved by Bank Negara Malaysia or at the bank's discretion. The *ta'widh* (compensation) on late payment may be varied by the bank at its absolute discretion or upon receipt of advise from Bank Negara Malaysia *upon written notification to the Customer*.
>
> (emphasis added)

[29] As clearly pointed out by learned counsel for the borrower, the following pertinent principles for the *ta'widh* charged in the asset sale agreement relevant to this case may be distilled from the above clause:

(i) the compensation for *ta'widh* is contracted at rate of 1% per annum;

(ii) the *ta'widh* is calculated from the date of such default until the date of payment of the amount thereof;

(iii) the *ta'widh* shall not be limited to the period of the financing; and

(iv) the rate of *ta'widh* can be varied upon written notification to the customer.

[30] It stands to reason that *ta'widh* is not chargeable in a case where there is no default as the borrower would have made payments at the appointed time under the agreed instalments based on the agreed selling price.

[31] It correspondingly makes sense, commercially speaking, for *ta'widh* to be chargeable if there is default on the payment of the loan in the instalment payments as, if there had been no default, then the instalments paid could be utilised for further lending by the bank to yield a profit which had now been lost.

[32] Since there had already been a contractually agreed rate of *ta'widh* provided for in the event of default in the instalments payments, we should not look at extraneous documents to justify a higher rate of *ta'widh* based on what the bank said was the applicable rate.

[33] After all it is consistent with Shariah principles as it is with known principles of contract law that parties are bound by what they have agreed unless there is fraud, coercion, undue influence, mistake or that the term agreed is unconscionable or illegal.

[34] It has not been shown how the 1% per annum charged for the *ta'widh* for late payment before the maturity date of the facilities is excessive and penalty in nature and that it is over and above the profit that the bank could have made. We must of course bear in mind always that the costs of fund and some profit element had already been costed into the selling price that the borrower would have paid if it had not defaulted in paying the instalments payments until the maturity of the facilities.

[35] Even if the bank could have shown that their profits lost because of the borrower's default is more than 1% per annum, even that would not justify varying the *ta'widh* rate agreed upon without prior notification to the borrower and in this case there was no evidence of a written notification to the borrower as provided for in the last sentence of section 9.32 of the asset sale agreements.

[36] The BNM guideline does not override what had been contractually agreed upon earlier between the bank and the borrower even if the *ta'widh* rate is more favourable to the borrower.

[37] The bank had charged the higher rate of *ta'widh* based on their own Interbank Islamic Money Market ("the bank's IIMM") rate or "r" rate for the period after termination from 1 May 2008 until 30 June 2012.

[38] From 1 July 2012 onwards the bank had imposed *ta'widh* at the pro-rated IIMM rates fixed by BNM ("BNM pro-rated IIMM rate").

[39] As the BBA facilities were taken in 2005 the relevant BNM Guideline 1998 would be applicable. In its original language it reads:

> The Bank Negara Letter (BNM Guideline 1998)
>
> Bilangan kami: 2201/015/5/2/1/RMI 10 Disember 1998
>
> Pengarah Urusan
> Malayan Banking Berhad
> Menara Maybank
> 100, Jalan Tun Perak
> Peti Surat 12010
> 50936 Kuala Lumpur.
>
> Tuan,
>
> Pengenaan Penalti Bagi Pembiayaan Perbankan Islam
>
> Bank Negara Malaysia ingin memaklumkan bahawa Majlis Penasihat Syariah Kebangsaan untuk Perbankan Islam dan Takaful telah meluluskan cadangan pengenaan penalti ke atas pembiayaan perbankan Islam yang gagal dilunaskan mengikut jadual.
>
> 2. Sehubungan dengan itu, mulai 1 Januari 1999, Bank Islam Malaysia Berhad dan institusi perbankan yang menyertai Skim Perbankan Islam (SPI) adalah dibenarkan untuk mengenakan penalti ke atas pembiayaan yang gagal dilunaskan mengikut jadual mengikut mekanisma yang ditentukan oleh Bank Negara Malaysia.

A 3. Oleh kerana dasar pengenaan penalti ini adalah satu dasar yang baru, institusi perbankan Islam (Bank Islam dan institusi perbankan yang menyertai SPI) hendaklah mengamalkan etika dan pendekatan yang berhemat apabila mengendalikan kes-kes pembiayaan perbankan Islam yang tidak dilunaskan mengikut jadual. Penalti yang dikenakan sebaik-baiknya hendaklah mencerminkan kerugian sebenar yang ditanggung oleh
B institusi perbankan. Di samping itu, institusi perbankan Islam hendaklah memberi pertimbangan dan budi bicara terhadap kes-kes pembiayaan yang menhadapi masalah aliran tunai, ataupun terhadap penerima biaya yang tidak menyalah gunakan kemudahan pembiayaan, ataupun kes-kes yang mempunyai merit supaya dikecualikan daripada dikenakan penalti.

C 4. Pengenaan penalti boleh dikenakan ke atas pembiayaan baru ataupun pembiayaan semasa, kecuali jika perjanjian pembiayaan secara jelas tidak mengenakan penalti sekiranya berlaku kegagalan melunaskan hutang pembiayaan di pihak penerima biaya. Walau bagaimanapun, sekiranya terdapat institusi perbankan Islam yang tidak mahu mengenakan penalti kepada pelanggannya yang gagal melunaskan pembiayaan mengikut
D jadual, ia adalah hak prerogative institusi berkenaan. Dalam pada itu, Bank Negara Malaysia akan sentiasa memantau perkembangan ini dari semasa ke semasa. Sila hubungi pegawai-pegawai kami di talian 2988044 sambungan 7535/7866/7707 untuk sebarang pertanyaan lanjut.

Sekian, terima kasih.

E Yang benar,
(Mohd Razif Abdul Kadir)
Pengarah
Jabatan Pengawalan Bank

[40] Nowhere in this BNM Guideline 1998 is it stated that the Islamic
F Banking Institutions ("IBI") are allowed to charge *ta'widh* but that if it is with respect to penalty that the IBI may be minded to charge then under para. 3 thereof the penalty shall reflect the actual loss incurred by the IBI and they shall also give due consideration to cases where there is a problem of cash flow and that there has been no abuse of the facility or that there are
G merits for the exemption of penalty.

[41] To clarify further in para. 4 thereof BNM said the penalty may be imposed except in cases where the agreement does not impose a penalty for default in payment. In any event if there are IBI that do not wish to impose penalty charges on their defaulting customers that is their prerogative.

H **[42]** Even assuming for a moment that the *ta'widh* charged is a type of or a subset of penalty, that is also already provided for at 1% per annum in the event of default in the schedule of payments and nothing was shown that it is penalty in nature.

I

[43] Learned counsel for the bank submitted that the BNM Guideline 1998 comes with two attachments or "lampiran" though these were not at all referred to in the said letter of BNM but then again the two attachments also referred to penalty not being more than 1% per annum. In its original language the two attachments are reproduced below:

Lampiran 1

Pengenaan Penalti Bagi Pembiayaan Perbankan Islam

1. Mekanisme penalty yang boleh dikenakan adalah seperti berikut:

(i) Bagi pembiayaan yang gagal dilunaskan dari tarikh pembiayaan tersebut dikeluarkan **sehingga tarikh matang, kadar penalti yang boleh dikenakan ialah 1% setahun ke atas ansuran tertunggak** ("overdue instalments"). Walau bagaimanapun, jumlah penalti tersebut tidak boleh dikompaunkan ("compounded") kepada ansuran tertunggak tersebut, (Lihat Lampiran 2)

(ii) Bagi pembiayaan yang gagal dilunaskan **dan melangkau tarikh matang, penalti yang boleh dikenakan ialah kadar semasa pasaran wang secara Islam bank berkenaan atau lebih dikenali sebagai kadar "r"** (iaitu kadar dividen kasar bagi akaun pelaburan bertempoh 12 bulan) ke atas baki harga belian (baki pokok).

Kadar ini akan berubah mengikut kadar "r" semasa institusi perbankan berkenaan. Seperti perenggan 1(i), jumlah penalti tersebut tidak boleh dikompaunkan ("compounded") kepada baki harga belian tersebut (Lihat Lampiran 3)

Lampiran 2

Penalti 1% setahun ke atas ansuran tertunggak

1. Kaedah ini digunakan bagi pembiayaan yang gagal dilunaskan dari tarikh pembiayaan tersebut dikeluarkan sehingga tarikh matang. **Jumlah penalti yang boleh dikenakan ialah 1% ke atas ansuran tertunggak ("overdue instalments")**. Walau bagaimanapun, jumlah penalti tersebut tidak boleh dikompaunkan ("compounded") kepada ansuran tertunggak tersebut. (emphasis added)

[44] Whichever way one reads the BNM Guideline 1998 with or without the attachments or "lampiran" there is still no basis or justification to charge *ta'widh* at the bank's IIMM rate before maturity date. There is also a distinction in the penalty charged before the maturity date and after the maturity date.

[45] We would of course gladly endorse such an approach, consistent as it is with both common as well as commercial sense, undergirded as it is with universal principles of contract. There is nothing stopping any IBI from being more generous than they should be for as wise Solomon once observed: whoever lends to those in need (without charging usury of course) would in reality be lending to god who is no man's debtor!

[46] Thus even as early as 1998, with this BNM guideline, the IBI may provide in their agreements the charging of penalty for default in the schedular payments of the loan facilities but that what is charged must be the actual loss suffered by the IBI.

[47] It goes without saying that it must first be provided for in the agreement executed and if it is not provided for it simply means that the IBI would not be charging penalty. Here, there is no provision on penalty in the BBA facilities agreements entered into in 2005 and the bank must be held to have contractually agreed not to so charge, being fully conscious of the BNM Guideline of 1998.

[48] The bank must be taken to have exercised their prerogative not to charge penalty. Instead it mentioned that *ta'widh* would be chargeable at the rate of 1% per annum and as it has not been shown how this is unconscionable as in that it is in reality a penalty which was not agreed upon or that it is not a reflection of the actual loss incurred by the bank, this court would allow it.

[49] It would be unconscionable for the bank, by a back door method, to introduce penalty by way of increasing unilaterally the rate for *ta'widh* when there is a default in the schedule of payments. While BNM may have permitted penalty to be charged that is an actual reflection of the loss suffered by the bank, there must first be an enabling provision in the BBA facilities agreements for penalty to be charged. In the absence of such a provision it would be disingenuous for the bank to impose it under the guise of their IIMM rate or the BNM pro-rated IIMM rate when contractually *ta'widh* had been fixed at 1% per annum and no written notice had been given to the borrower for its increase.

[50] We therefore are perplexed with the position taken by the learned High Court Judge when she held as follows in her grounds of judgment:

> 24. **In compliance of the BNM Guideline 1998, the defendant imposed *ta'widh* at the defendant's IIMM/"r" Rate after the balance Purchase Price became due and payable**. Therefore, I agree with the defendant's submission that they merely complied with the formula prescribed in the BNM Guideline 199S. Also **there is nothing in the BNM Guideline 1998 which requires notice to be given in imposing *ta'widh* at the rates set out therein**. Given these, there is no requirement to give notice particularly when the parties already agreed that the Guideline issued by BNM would apply. Any lack of such notice did not prejudice the Plaintiff as **the formula of *ta'widh* was decided by the regulator, BNM**.
>
> (emphasis added)

[51] At the risk of repeating ourselves the BNM Guideline 1998 did not address the issue of *ta'widh* but penalty and neither was there a formula of the bank's IIMM rate for *ta'widh* in the BNM guideline.

[52] As for the BNM Guideline 1998 being silent on the need to give notice for the rate set for the *ta'widh*, all it simply means is that in the absence of any guideline on the giving of notice, then the contractual requirement of notice for any change in the *ta'widh* has to be followed unless the bank is imposing the contractually agreed rate of 1% per annum.

[53] It cannot be that just because the BNM Guideline 1998 is silent on the need to give notice for any change in the *ta'widh* rate then no notice is required. Taking that argument to its logical conclusion and a highly dangerous one at that, it would mean that where the guideline is silent on any matter the bank may impose any terms they see fit, without the need to comply with the contractually agreed terms! That would be repugnant to any understanding of contract law whether secular or Islamic.

[54] The issue that the BNM Guideline 1998 sought to address was the validity of the charging of penalty and in 1998 BNM had already addressed that. Basically, the IBI may charge that in their agreements but that it shall be the actual loss of profit suffered by the banking institutions and that it must be fair and reasonable taking into account all relevant factors set out in the said guideline.

[55] It was clearly a case where penalty was not provided for contractually, and the bank has now imposed the so-called *ta'widh* at more than the stated rate without giving any written notice.

[56] In fact at the oral argument stage, learned counsel for the borrower had conceded and condescended to that the 1% per annum rate for *ta'widh* is what is contractually provided for and not the bank's IIMM rate or the BNM pro-rated IIMM rate for the period from default to full payment before maturity dates of the BBA facilities.

[57] The BNM Guideline 1998 does not in any way prohibit any IBI from granting any terms more favourable to their customers and it certainly does not take away any already accrued contractual rights to the detriment of the customer or the borrower here. At any rate the BBA facilities agreements were executed after the BNM Guideline 1998 and any reference to penalty could easily have been incorporated into the BBA facility agreements.

[58] The position becomes unmistakably clear, if at all there was any room for doubt, when BNM subsequent guidelines, resolutions, rulings and illustrations again addressed this issue of *ta'widh*.

[59] We find the following passage in Bullen & Leake & Jacob's *Malaysian Precedents of Pleadings*, Sweet & Maxwell, 2017 helpful:

ta'widh* and *gharamah

21.27 Notwithstanding the promise by the customer to pay the instalments punctually, in practice, there will always be customers who delay in their repayments to the bank. If this is a conventional loan, the bankers could charge a specific defaulting interest until full settlement. For the recovery of muamalat matters, the SAC has ruled that Islamic banks can charge two different charges as late payment charges, i.e. *ta'widh* (compensation) and *gharamah* (penalty). Both of these can be charged by Islamic banks on their customers who have delayed in their payment to the bank. In the earlier, *BNM set the 1% rule during the tenure namely, the ta'widh payable should not be more than 1% per annum on daily rest basis over the arrears. It must be non-compounding. However, in the event that there is a default in payment after the maturity of the tenure, the rate applicable should not be more than the prevailing rate of the International Islamic Monetary Market* ("IIMM"). This is the reference rate prescribed by BNM which must be observed by the IFIs to compensate the financier for all the losses suffered due to late payment by the customer. (emphasis added)

[60] The Late Payment Charges ("LPC") Guidelines 2012 explains the concept of *ta'widh* (compensation) and *gharamah* (penalty).

[61] We agree with learned counsel for the borrower that in the context of the LPC Guidelines, *ta'widh* refers to the amount that may be compensated to the IBI based on the actual loss incurred due to default, whilst *gharamah* refers to the penalty charged on the defaulters over and above the *ta'widh* (see s. 5.1 LPC Guidelines 2012 - p. 1945, rekod rayuan, bahagian C (Jilid 4)).

[62] Section 5.2.2 of the LPC Guidelines 2012 explains in detail the principle and the application of *ta'widh* as follows:

Section 5.2.2 - Principle 2: *ta'widh*

The IBI shall be compensated up to the amount of actual loss incurred as a direct result of the delay in repayment or default by the customer.

The IBI are allowed to be compensated by way of *ta'widh* up to (or equivalent to) the actual amount of losses incurred by the IBI's subject to the overall combined rate limit. In determining the compensation rate of actual loss incurred, the IBI's are required to observe the reference rate as prescribed by the bank as follows:

(i) *The actual loss to be compensated from any default payment, from the date of payment until the maturity date shall not be more than 1% per annum*:

(a) on the overdue instalments of the Islamic financial product in the case of default of scheduled payments (Diagram 2.1); or

(b) *on outstanding balance (subject to ibra' if applicable) of the Islamic financial product in the case of default causing the entire facility to be recalled or brought to court for judgment prior to maturity (Diagram 2.2* and 2.3).

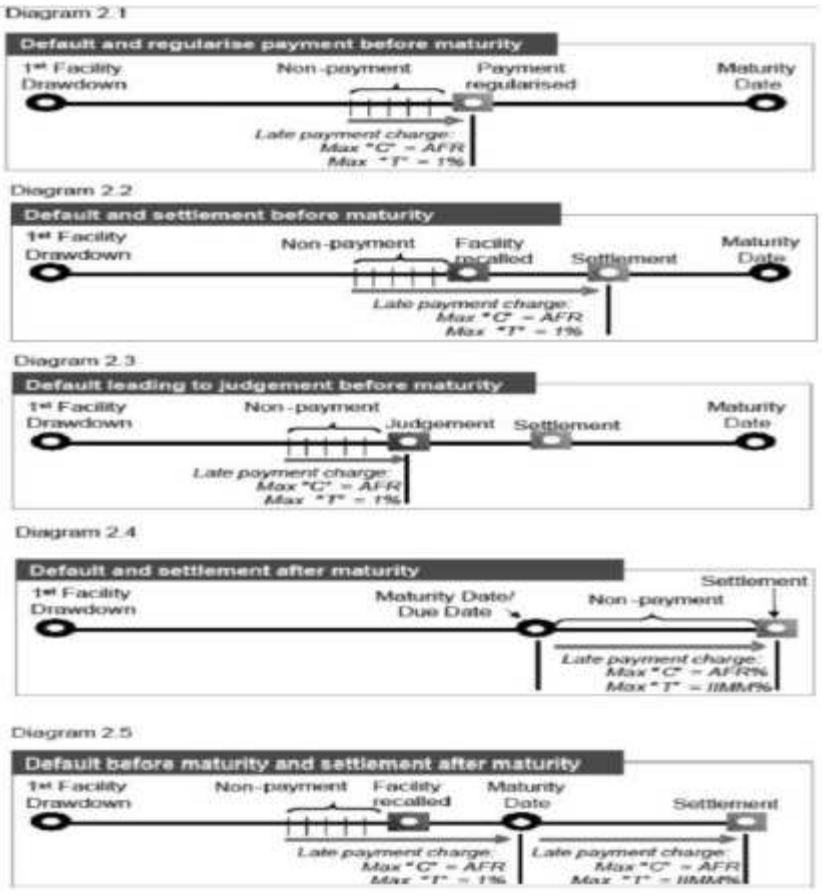
(ii) The actual loss to be compensated from *default payment which exceeded the maturity date shall not be more than the prevailing daily overnight Islamic Interbank rate (IIMM)* on the outstanding balance (subject to *ibra'* if applicable) of the Islamic financial product (Diagrams 2.4 to 2.6)

(iii) The reference rate for the actual loss shall be determined at the point of default, computed on a monthly basis from the payment due date. (Refer to the illustration in Appendix I).

(iv) The *ta'widh* earned shall also be included in the computation of distributable to depositors/investment income holders.

(emphasis added)

[63] The LPC Guidelines 2012 were issued after the BBA facility agreements were executed in 2005 but it endorsed what had been the practice of the IBI in the charging of 1% per annum for the *ta'widh*.



[64] The illustration that fits the present scenario where there was a termination of the BBA facility agreements and a recall of the facility is that of diagram 2.2 in the LPC Guidelines 2012 where that diagram 2.2 is shown above together with the other diagrams for both comparison and contrast.

[65] There is no rhyme nor reason to bring forward the maturity date which remains constant throughout the BBA facility even in the case of default and early termination and recall followed by settlement before the maturity date. There is no basis for suggesting and interpreting the BBA facilities tenured for eight years to have prematurely matured before the eight years' period upon termination or cancellation or recall of the facilities which involves the borrower paying back the bank the balance selling price of the assets. The profit for the BBA facilities had been contracted and calculated up to the very last day of the eight years' tenure as the profits earned by the bank on the maturity date of the facilities.

[66] In fact, the maturity date remains constant in all the five illustrations further underscoring the point that early or late settlement does not change the maturity date irrespective of whether there is a recall of the facility.

[67] As borne out by diagram 2.2, there was first a default in payment of the schedule of payments and then the facility was recalled and settlement was before the maturity date for each of the BBA facility agreement in dispute.

[68] The only time when the IBI was allowed to charge the IIMM rate was after the maturity date as shown in diagrams 2.4 and 2.5.

[69] We must be forgiven for not been able to appreciate the learned judge's reasoning at para. 26 of her grounds of judgment reproduced below:

> 26. Therefore, the defendant is entitled to impose *ta'widh* pursuant to BNM Guideline 1998 which is the applicable Guideline on *ta'widh* at the time when the Financing Agreements were executed, **when the BBA Facilities were recalled and when the defendant began to impose *ta'widh***. Pursuant to the BNM Guideline 1998, upon cancellation of the BBA Facilities, **the defendant is entitled to impose *ta'widh* at the Rate that has been imposed by the bank and not merely 1% p.a.** (emphasis added)

[70] In *Kuwait Finance House (Malaysia) Bhd lwn. Teknogaya Diversified Sdn Bhd & Yang Lain* [2012] 1 LNS 233; [2012] MLJU 282, Justice Mohd Zawawi Salleh J (now FCJ) observed as follows:

> [21] Berdasarkan terma di atas, adalah jelas bahawa terdapat dua (2) kadar fi pampasan/ganti rugi yang dipersetujui oleh kedua-dua pihak apabila berlaku kelewatan bayaran ansuran dan bayaran tertunggak, iaitu:
>
> (i) Sebelum tempoh matang kedua-dua Kemudahan *Tawarruq* tersebut tamat; dan
>
> (ii) Selepas tamat tempoh matang kedua-dua Kemudahan *Tawarruq* tersebut.

[22] Peguam terpelajar pihak Plaintif telah memaklumkan kepada Mahkamah bahawa tempoh matang kedua-dua Kemudahan *Tawarruq* tersebut akan tamat pada 29.1.2014. Oleh yang demikian, pada pendapat Mahkamah, hak Plaintif untuk satu fi pampasan lanjutan atas pasaran Wang Inter-bank Islam Plaintif (R-Rate) hanya boleh dibenarkan jika tempoh matang kedua-dua Kemudahan *Tawarruq* tersebut tamat.

[71] What then is the correct *ta'widh* that is chargeable for a default before maturity date and upon the termination of the facility agreements?

[72] Learned counsel for the borrower had prepared a table in encl. 29 of the appellant's supplementary BOD at p. 8 setting out the bank's calculation of the *ta'widh* at columns (a) and (b) and the correct calculation at column (c) as follows:

Table of *ta'widh* charged by the bank

Financing Facilities	*Ta widh* at 'r'/IIMM rate on the Balance Purchase Price (after deduction of the waiver and profit refunded due to early settlement) - see Tab 89, 90 & 91 CCDS (a)	*ta'widh* at 1% p.a. on Balance Sale Price STATEMENT OF ACCOUNT A (b)	Differential *ta widh* between 'r'/IIMM rate on Balance Purchase Price and 1% p.a. on Balance Sale Price (a) - (b) (c)
BBATF1	4,530,128.82 [5,551,890.42 - 1,000,000 (*ta'widh* waived & not paid by customer) - 21,761.60 (*ta'widh* sum refunded to Customer)]	1,158,646.54	3,371,482.28
BBATF3	1,775,818.14 [1,782,494.24 - 6,676.10 (*ta'widh* sum refunded to Customer)]	373,062.51	1,402,755.63
BBATF4	293,990.05 [295,095.26 - 1,105.21 (*ta'widh* sum refunded to Customer)]	62,942.17	231,047.88
TOTAL	6,599.937.01	1,594,651.22	5,005,285.79

[73] As can be seen and as confirmed by learned counsel for the bank, if the bank had charged *ta'widh* based on the IIMM rate or "r" rate on the balance purchase price from the date of termination of the facility agreements ie, from 1 May 2008 till 15 April 2013 the amount would be RM6,599,937.01. In fact, the bank actually charged RM7,629,479.92 before giving a discount of RM1,000,000 on the *ta'widh* which is now the subject matter of the appeal by the bank on the striking out of their counterclaim in the High Court below.

[74] Learned counsel for the bank also confirmed that based on the rate of 1% per annum for the same period, the amount works out to be RM1,594,651.22. Hitherto whenever the rate of 1% per annum was referred to, it had not been stated whether it is on the balance purchase price or on the balance sale price.

[75] We wish to state here that the 1% per annum of *ta'widh* should be based on the balance sale price as if there had not been a default on the full sale price would have been paid upon maturity date. Hence, any failure to pay the schedular instalments payments would require the borrower to compensate the bank based on the balance sale price as at the date of termination of the facility agreement upon default plus the compensation based on the profit that the bank would have earned had the instalments been paid on time as represented in the *ta'widh*.

[76] Therefore, the excess *ta'widh* paid is RM5,005,285.79 (RM6,599,937.01 - RM1,594,651.22) which amount we had ordered the bank to refund to the borrower.

Whether The Issue As To The Charging Of Ta'widh Should Be Referred To The SAC For Determination As To Whether It Is Illegal Under The Shariah

[77] The fact that the civil court has jurisdiction to hear a claim based on an Islamic finance instrument is not in dispute. (See *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22 (CA); *Maybank Islamic Bhd v. M-10 Builders Sdn Bhd & Anor* [2017] 7 CLJ 127; [2016] MLRAU 532; and *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625; [2003] 2 MLJ 408 (CA).

[78] The concern that a certain Islamic Banking instrument or term in it should be Shariah compliant is understandable not least because there are various interpretations of what is Shariah compliant and what is not amongst Islamic scholars worldwide depending on one's school of thought or mazhab. (See *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd & Another Case* [2010] 4 CLJ 388; [2009] 6 MLJ 416 and *Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* [2011] 4 CLJ 654; [2011] 3 MLJ 26 where this concern was acknowledged).

[79] The Federal Court in *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569; [2019] 3 MLJ 561, speaking through Justice Mohd Zawawi Salleh FCJ captured this concern concisely as follows:

> [56] Hence, Shariah compliance is the backbone of Islamic banking finance industry and Shariah principles are the *raison detre* of all Islamic financial contracts. It gives legitimacy to the practices of Islamic banking and finance industry and thus validate the profits. It also boosts the confidence of all stakeholders that all the practices and activities of the bank are in compliance with the Shariah. Besides, section 28(2) of the

Islamic Finance Services Act 2013 states that one of the duties of an Islamic Financial institution is "to ensure that its aim and operation, business, affairs and activities are in compliance with Shariah".

[57] However, compliance with Shariah will be confidently achieved only by having a proper Shariah governance framework. This is because Shariah governance is meant to ensure compliance by Islamic banking and finance industry with the rules of Shariah.

[80] We accept the fact that the civil court shall not decide on whether a matter under Islamic banking is in compliance with the Shariah as this comes within the expert opinion of the SAC whose opinion is binding on the civil court as stated by the majority in the *JRI Resources* case (*supra*). A brief history to the setting up of the SAC could be found in the *dicta* of Justice Azahar Mohamed FCJ (now CJM) in *JRI Resources* case *(supra*) as follows:

[185] Among the challenges facing the Islamic financial services industry are the development of financial services and instruments that are Shariah compliant, commercially viable, valid and enforceable, based on the prevailing governing laws (see *The New Central Bank of Malaysia Act 2009 (Act 701): Enhancing the Integrity and Role of the Shariah Advisory Council (SAC) in Islamic Finance* by Hakimah Yaacob). Consequently, the SAC was established to preclude any uncertainties in the interpretation of Islamic laws with regard to Islamic financial business. The SAC was established pursuant to s 124 of the (now repealed) Banking and Financial Institutions Act 1989, which was amended *vide* the Banking and Financial Institutions (Amendment) Act 1996. The amending Act had amended s. 124(7) to state as follows:

(7) For the purposes of this section:

(a) there shall be established a Syariah Advisory Council which shall consist of such members, and shall have such functions, powers and duties as may be specified by the Bank to advise the Bank on the Syariah relating to Islamic banking business or Islamic financial business;

[186] It was as a result of all the above that the Central Bank of Malaysia Act 1958 ('the 1958 Act') was then amended to introduce s. 16B, which came into force on 1 January 2004. Section 16B of the 1958 Act provided for the SAC to become the authority for the ascertainment of Islamic law for Islamic banking business, takaful business, Islamic financial business, Islamic development financial business or any other business which is based on Shariah principles that are supervised and regulated by CBM.

[81] However, we must hasten to add that not every matter raised for submission to the SAC should be referred to the SAC especially when the same matter had already been addressed by specific guidelines, rulings or resolutions issued by BNM under the various statutes in relation to Islamic banking or by the SAC.

[82] This is so even after the enhancement of the status of the SAC rulings in the Central Bank of Malaysia Act 2009 ("CBMA 2009") that repealed the Central Bank of Malaysia Act 1958 ("CBMA 1958") where in s. 57 of the CBMA 2009 it further provides that any ruling made by the Shariah Advisory Council pursuant to a reference made shall be binding on the Islamic financial institutions under s. 55 and the court or arbitrator making a reference under s. 56.

[83] Section 56 of the CBMA 2009 clearly envisages two options that the civil courts have when confronted with a request to refer a question to the SAC with respect to a dispute involving an Islamic finance claim. One is to ascertain if there are already existing rulings of the SAC on the question raised and only when there is none, then to refer to the SAC for its ruling as was held by the majority in the *JRI Resources* case (*supra*) as follows as per Azahar Mohamed FCJ (now CJM) as follows:

> [198] Pursuant to the impugned provisions, it is now mandatory for the courts **to refer to any published rulings of the SAC and in the absence of such rulings, to refer a question to the SAC for a ruling on Shariah matters** and such rulings shall be binding on the courts [under s. 57]. Section 56 of the CBMA 2009 provides:
>
> (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be, shall:
>
> (a) **take into consideration any published rulings of the Shariah Advisory Council; or**
>
> (b) **refer such question to the Shariah Advisory Council for its ruling**.
>
> (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.
>
> (emphasis added)

[84] The civil court decides whether an issue raised should be referred to the SAC for its expert opinion having regard to whether the issue calls for determination under Shariah law and even if it does whether the issue had been raised and decided before by the SAC, in which case the civil court would generally follow the opinion as already rendered by the SAC.

[85] Otherwise there would be unnecessary reference to the SAC merely because an issue is raised by a borrower and couched as a Shariah issue for determination by the SAC. Not only would that be an abuse of the process of referral to the SAC but that the proceedings in the court would be delayed against the backdrop of innumerable questions that may be crafted from time to time for reference to the SAC before the conclusion of a trial!

[86] If support for such an approach is needed, we would refer to Bullen & Leake & Jacob's *Malaysian Precedents of Pleadings*, Sweet & Maxwell, 2017 as follows:

Illustration of the working process of sections 56 and 57 [CBMA 2009]

21.14 The case of *Bank Islam Malaysia Berhad v. Helcom Engineering Corp Sdn Bhd & Ors* [2011] 1 LNS 1862 provides a good case study on how a reference to the SAC could be done in a litigation case when the parties dispute the validity of a practice under the Shariah. The Shariah issue in dispute in this case was concerning the late payment compensation (*ta'widh*) charged by the financier. In this case, the parties had agreed to restructure the outstanding sum under few previous facilities into a Cash Note-i Facility. The defendants failed to service the payment of the Cash Note i-Facility on a regular basis. After the defendants failed to respond to the letter of demand issued by the plaintiffs solicitor, the plaintiff brought a civil action against the defendant's. In defence to the summary judgment application filed by the plaintiff, the defendant alleged, *inter alia* that the pre-determined *ta'widh* (compensation) was actually interest imposed by the bank.

21.15 *Being of the view that the dispute was actually Shariah in nature, the court initiated section 56(a) (reference to published ruling by the SAC), in its attempt to ascertain the position of the Shariah on this.*

21.16 *The court noted the SAC had resolved earlier in its published rulings that ta'widh as a result of the default on the part of the customers was permissible to be claimed by the bank. However, with regard to the question whether ta'widh can be pre-determined by the parties in the agreements without proving the damages suffered by the bank, there was no published ruling by the SAC.*

21.17 Hence, it fitted perfectly into the ambit of section 56(b) to make a specific reference to the SAC. Upon application by the defendants, the court formulated a Shariah issue and referred it to the SAC. The question put forward to the SAC was:

> Whether the *ta'widh* rate can be fixed and/or agreed upfront/pre-determined by the parties in a contract without the need to prove the loss suffered by the Bank.

The SAC replied speedily (11 days later), *inter alia*, that:

(1) The parties to a contract cannot pre-determine the *ta'widh* rate by adopting their own calculation.

(2) However, the contracting parties may agree on a *ta'widh* rate fixed by the authority. The authority in the banking industry is BNM.

21.19 It is appropriate to note here that in the question posed to the SAC, details or background facts of the case were not actually mentioned. The reply from the SAC was but to outline the *Shariah* principle on point. Adopting it and applying it to the material facts of the case, the court thus decided that the claim for *ta'widh* by the plaintiff in this case was lawful.

(emphasis added)

[87] When we look at the issue of *ta'widh* raised, we find that the matter had been addressed in the relevant directions, rulings and resolutions of BNM and the SAC.

[88] Thus if the borrower refers to a ruling of the SAC and submits that it is applicable and the bank submits that it is not or that another ruling is applicable because the factual matrix is different, then it is for the court to interpret the seemingly contradictory rulings or resolutions following the established principles of interpretation. Only when the court is of the view that the matter is novel in that existing rulings or resolutions do not deal with the matter or issue at hand then only would there arise a need to refer to the SAC.

[89] The borrower had raised that there should be no imposition of *ta'widh* based on the SAC resolution at its 24th meeting dated 24 April 2002 as compiled in the *BNM Shariah Advisory Resolution*, 2nd edn, as follows:

> **82. Imposition of Compensation on a Customer who Makes Early Settlement**
>
> The SAC was referred to on the issue as to whether AN Islamic financial institution may impose compensation on a customer who makes early settlement in an Islamic financing.
>
> **Resolution:**
>
> The SAC in its 24th meeting dated 24 April 2002 has resolved that an Islamic financial institution is **not allowed to claim compensation** from a customer who make early settlement in an Islamic financial.
>
> (emphasis added)

[90] Learned counsel for the borrower submitted that since the facilities were fully repaid and settled on 15 April 2013, earlier than the facility tenure of eight years which will mature on 1 September 2014 (BBA-1), 6 October 2014 (BBA-3) and 1 June 2015 (BBA-4) respectively, then based on the above resolution, no *ta'widh* is chargeable.

[91] That of course does not take into consideration that there was default in the schedular payment leading to a termination of the facility agreements and there was non-payment from 1 May 2008 till 15 April 2013. The above resolution was obviously referring to a situation where there was no default and there was early settlement before maturity date. The more relevant ruling would be the BNM Guideline 1998 as alluded to above and as further clarified and explained by the LPC Guidelines 2012.

[92] Therefore when confronted by counsel that there is a Shariah issue to be referred to the SAC the judge in the civil court need not have to immediately raise his hands and say "Hold it, I cannot continue further until this matter is referred to the SAC for its opinion which would be binding on me".

[93] He should instead follow the following steps:

(i) is the issue raise ostensibly a Shariah issue or is it a pure contractual issue bereft of any Shariah element;

(ii) if it is a Shariah issue is there already a guideline, ruling or resolution of BNM or SAC on this particular issue;

(iii) if there are more than one guideline, ruling or resolution on this issue the court may proceed to decide which is the applicable one considering the factual matrix of the case; and

(iv) if the matter or issue raised is a Shariah issue and there is no pending guideline, ruling or resolution on it, then the court would refer the matter or issue to the SAC.

[94] We cannot see how the reference to the SAC would throw fresh light on the issue of the imposition of *ta'widh* in the factual matrix of this case. The borrower seemed to have abandoned this issue of the need to refer to the SAC as this court had decided on what is the proper calculation of the *ta'widh* and the borrower had not appealed against this decision.

[95] The bank and the High Court had taken the view that there is no need to refer the issue of *ta'widh* to the SAC and with that we agree for the reasons given above.

Whether Limitation Had Set In When The Borrower Claimed For The Excess Amount Of Ta'widh Paid

[96] The bank's contention is that it is too late now for the borrower to have sued for a refund of the excess *ta'widh* paid on 30 April 2013 because the claim is statute-barred. The bank said that the cause of action accrued when *ta'widh* was first charged on 1 May 2008 when the borrower was in breach of the facilities agreements.

[97] The bank's argument is that if the *ta'widh* is wrongly charged then the breach first arose then and the limitation period to bring an action to recover the amount overcharged expired on 2 May 2014. Since the appellant borrower only brought this action on 23 August 2017, it is caught by limitation as it is some three years after the expiry of the limitation period. (See s. 6(1)(a) of the Limitation Act 1953).

[98] Under s. 6(1)(a) of the Limitation Act 1953, the borrower has six years to bring his action against the bank under contract as represented by the facilities agreements from the date the cause of action accrued.

[99] The Federal Court in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, explained that:

> Time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the

A agreement. **A cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach**. (emphasis added)

[100] It was further clarified as follows:

B This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* ... the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but **it has always been held that the statute runs from the earliest time at which an action could be brought**. (emphasis added)

C **[101]** More recently the Court of Appeal in *Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors* [2015] 9 CLJ 422; [2016] 1 MLJ 507, held *inter alia* that:

D The respondents' claims were time barred under s 6(1)(a) of the Limitation Act 1953. Being founded in contract, the principle of law was that a claim for breach of contract had to be commenced at the earliest possible time **when the innocent party became aware of the breach**. (emphasis added)

[102] See also *Kong Ming Bank Bhd v. Sim Siok Eng* [1982] 1 LNS 12; [1982] 2 MLJ 205 (PC) and *Peng Bee Sdn Bhd v. Teoh Liang Teh & Ors* [2000] 4 CLJ
E 825; [2001] 1 MLJ 1 (Court of Appeal).

[103] We are not unaware of the *dicta* of the Federal Court in *The Great Eastern Life Assurance Company Limited v. Indra Janardhana Menon* [2005] 1 LNS 178; [2006] 2 MLJ 209, where the court held *inter alia* that:

F (3) A cause of action founded on contract accrues on the date of its breach and time begins to run from that breach. In the instant case, the claimant's cause of action only arose when the appellant allegedly breached its obligation to pay the claimant his commission in 1986. When the claimant filed his action in court in 1993, the claim had already become time-barred ...

G (4) In the instant case, *there was no contractual modification or alteration in any of the contracts binding the claimant to the appellant that could be relied upon to shift the time of breach to some time in the future. In the absence of such modification, the general principle of law that time begins to run from the date of breach, applied* ...

H (5) The Court of Appeal had also erred in concluding that so long as the parties remained in contractual relationship, no period of limitation existed. There was no basis for such a conclusion given that the Act itself prescribes when time begins to run for the purpose of computing limitation periods ... (emphasis added)

I

[104] We have no quarrel or quibble with the above proposition that generally a cause of action in contract would arise from the date of the breach of the contract. However, parties by conduct and consent may agree to postpone the same until the happening of a certain event as in a moratorium to be put in place.

[105] A moratorium is in effect a case where the parties have agreed not to raise or plead limitation for the period agreed upon as a defence to a claim and this is envisaged in s. 4 of the Limitation Act 1953 as follows:

> Limitation not to operate as a bar unless specially pleaded
>
> 4. Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[106] The agreement on the moratorium is patent from even the written submission of the respondent bank as follows:

> 11. With the R & M's consent, the directors of the appellant brought an arbitral claim against the Government of Malaysia for breach of a contract between them. The directors of the appellant also requested the R & M not to sell the assets charged by the appellant to the respondent as the availability of the charged assets would greatly enhance the appellant's bargaining power and prospect of success of their claim and to seek a higher compensation against the Government of Malaysia. *With the agreement of the Respondent, the R & M agreed to the appellant's directors' request. Under these circumstances, the Respondent withheld recovery action against the appellant and their directors.*
>
> 12. Between year 2011 and 24.7.2012, at the request of the R & M, the Respondent furnished the appellant with the amount due and owing under the BBA Facilities to enable the appellant to prosecute the arbitral claim against the Government of Malaysia. The appellant did not raise any issue with the calculations provided.
>
> 13. On or around 19.2.2013, the learned Arbitrator made an award in favour of the appellant and awarded total damages of RM66,680,489.78 and interest of RM25,344,894.63 ("Arbitral Award"). This sum was duly paid by the Government of Malaysia to the appellant. (emphasis added)

[107] We must say the bank was acting in compliance with Shariah principle that since the default was not a case where the borrower wilful refusal to pay but rather that it could not as the Government of Malaysia had wrongfully terminated their contract with them and there was no payments made by the Government of Malaysia until the matter was taken to arbitration and an award was handed in its favour.

[108] The borrower wasted no time in paying the bank and did so on 30 April 2013, some three months after the award, subject to terms.

[109] Assuming for a moment that it had taken more than six years from 1 May 2008 for the award to have been delivered, if the borrower had not paid, it would still be within time for the bank to sue to recover under contract in the facilities agreements as time would only begin to run after the award had been delivered.

[110] The Supreme Court in the case of *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188 at p. 762 (CLJ); p. 196 (MLJ), observed as follows:

> It is clear law, that *in the absence of express contractual provision*, the purchaser's right to sue for damages would accrue on the date of the breach of contract. (See *Nasri v. Mesah* [1971] 1 MLJ 32 at p 34; *Reeves v. Butcher* [1891] 2 QB 509 at p. 511; *Gibbs v. Guild* (1881 - 1882) 8 QBD 296 at p 302). But, *the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in Loh Wai Lian.* (emphasis added)

[111] An example of parties mutually agreeing to a different date for the commencement of a cause of action in contract would be cl. 24(4) of the statutory standard form Sale and Purchase Agreement (Land and Building) in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 as follows:

> (4) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Property.

[112] Ordinarily the cause of action would have arisen the moment the developer fails to deliver vacant possession within 24 months from the date of the sale and purchase agreement but with the agreement, limitation does not begin to run until the purchaser takes vacant possession of the completed property.

[113] See also the case of *Kerajaan Malaysia v. KCSB Konsortium Sdn Bhd* [2019] 1 LNS 837; [2019] 10 MLJ 429 where parties in a consent judgment agreed to a moratorium and not raise limitation for a certain period if the terms of the consent judgment could not be fulfilled with the parties at liberty to then file a fresh claim against each other.

[114] As the award was delivered around 19 February 2013 it was well within the six-year limitation period when the borrower as the plaintiff in the High Court brought this action on 23 August 2017.

Whether There Was A Full Accord And Satisfaction With The Payment Of RM42,045,000 Barring The Borrower Now Claiming A Refund Of The Excess

[115] Whether or not there is a full and unqualified accord and satisfaction would have to be determined from the four walls of the cover letter of 15 April 2013 enclosing the cheque for the payment of RM42,045,000. The

cover letter of the borrower's solicitors Messrs Arshad Azhari & Associates dated 15 April 2013 could not have been clearer. It reads:

> 3. We were further instructed that YBhg Dato' Ahmad Zabidi bin Md Zain in his personal capacity as the director and shareholder of PNAS has disputed and put up a notice that there are discrepancies in the Statement of Accounts furnished by your good Bank to our client, in excess of RM6,030,617.74, *manifestly erroneous* and syariah non-compliance (*sic*) for reasons stated in his letter to your good bank dated 4th April 2013 (copy enclosed).
>
> 4. Pursuant thereto, we were instructed to forward our Client's Account cheque CIMB No. 246305 for the sum of *RM42,045,000.00* only being payment due under for above account pursuant to your letter dated *15th March 2013 and 29th March 2013, with reservation to our client's right and access for the full and correct Statement of Account and for the refund of excess payment based on the actual balance due under the account after ta'widh and ibrar and WITHOUT PREJUDICE to our client's right and remedy available in law in respect thereof.*
>
> 5. We believe the payment of the sum RM42,045,000.00 above would absolve our client's liability with your good Bank and *would entitle them for a full release from the facility without prejudice to our client's right for correct balance and full refund*, the release of the mortgages and charges, and the uplifting of the receivership status.
>
> 6. Kindly acknowledged receipt. (emphasis added)

[116] See paras. 4 and 5 of the appellant's solicitors letter dated 15 April 2013 at p. 1649 of the common core bundle of documents.

[117] It was a case where the bank had the vantage position of the securities being intact and the receivership in place and the borrower had little choice but to pay first and dispute later which right the borrower was careful to reserve.

[118] It is thus crystal clear that the payment was subject to the reservation of the borrower's right to a full refund of the excess payment after taking into account the *ta'widh* that could be validly charged.

[119] A fresh contract had come into being with a new consideration in that the bank would not need to sue for the loan outstanding plus proper and valid *ta'widh* charged and the borrower in turn got a release of all mortgages and charges as well as the uplifting of the receivership with the reservation of its right to claim for a refund of the excess *ta'widh* paid.

[120] The words "Without Prejudice" were capitalised just in case the bank might be tempted to overlook it and the payment was strictly without prejudice to its right and remedy available in law in respect of the *ta'widh*.

[121] The bank need not have to agree to the conditions or qualifications or reservation of rights set out by the borrower in which case the bank would have to return the cheque and sue for the whole outstanding loan sum plus valid charges of *ta'widh* and the borrower would doubtlessly put in a counterclaim for the excess amount of *ta'widh* charged.

[122] As it transpired this did not happen as the bank accepted the cheque which cleared and by so doing the bank is deemed to have accepted the terms upon which the payment was made.

[123] In fact, in their letter dated 17 April 2013 the bank had expressly stated that they were receiving the cheque on a without prejudice basis, which is tacit, if not express recognition that they had accepted the payment on the terms stipulated by the borrower, ie, that it was paid on a without prejudice basis. The bank's letter reads as follows:

> We refer to your letter dated 15 April 2013.
>
> Please be informed that we will present your client's CIMB cheque No. 246305 to be honoured immediately. Please note that the presentation of the cheque is **without prejudice to our rights with regard to the assertions made in your client's letter dated 4 April 2013 and your letter dated 15 April 2013 in regard to the accuracy of the sums due by the borrower**. For the record, we do not admit any of the assertions made in your client's letter and your letter.
>
> We reserve all our rights. (emphasis added)

[124] Clearly, both sides were not conceding anything where *ta'widh* was concerned and both were equally aware that if they cannot agree on the *ta'widh* then the court would have to decide.

[125] The borrower had little negotiating power for if it did not pay the amount as stipulated by the bank by the deadline set on 30 April 2013, it would continue to bleed and be under receivership with its attendant reputational risks.

[126] For context on what had become critical, the bank's letter of 15 March 2013 was nothing short of a serious ultimatum before suing as follows:

> 4. Please be advised that the Bank is agreeable on a strictly without prejudice basis to waive the *ta'widh* of RM1 million subject to the following terms and conditions:
>
> (a) **The amount of RM42.045 million is received by the Bank on or before 30.4.2013** (which is the amount due and owing to the Bank as at 30.4.2013 after taking into consideration the RM 1 million waiver of *ta'widh*);
>
> (b) The Bank's conditional approval for the waiver of *ta'widh* of RM1 million is deemed cancelled and revoked should you fail to comply with the item 4(a) above **and the Bank will commence legal**

> **proceedings against you and all the securities parties** for the whole outstanding balance still owing to the Bank without further reference or notice to you. (emphasis added)

[127] The observation of the Federal Court in *CIMB Bank Bhd v. Anthony Lawrence Bourke & Anor* [2019] 2 CLJ 1; [2019] 2 MLJ 1 would resonate well with the borrower:

> [65] Clause 12 may typically be found in most banking agreements. In reality, the bargaining powers of the parties to the agreement are different and never equal. The parties seldom deal on equal terms. In today's commercial world, the reality is that if a customer wishes to buy a product or obtain a services, he has to accept the terms and condition of a standard contract prepared by the other party. The Plaintiffs, as borrowers in the instant case, are no different. They have unequal bargaining powers with the Defendant. As succinctly put by Lord Reid in the House of Lords in *Suisse Atlantique Societe D'armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61.
>
> > Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex conditions which are not so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would be generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining.
>
> [66] In our considered view, this is one instance which merits the application of the principle of public policy. There is the patent of unfairness and injustice to the Plaintiff had this Clause 12 been allowed to deny their claim/rights against the Defendant. It is unconscionable on the part of the bank to seek refuge behind the clause and an abuse of the freedom of contract. As stated by Denning LJ in *John Lee & Sons (Grantham) Ltd And Others v. Railway Executive* (1949) All ER 581:
>
> > Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused.

[128] Fortunately for the borrower it had enlisted the assistance of its solicitors to liaise with the Bank at the negotiation stage to reserve its rights and to ensure that it is not being ridden roughshod over.

[129] It is not disputed that the relevant securities in the mortgages and charges were released and the receivership was uplifted. Upon closer examination of the *ta'widh* charged as gleaned from the detailed statement of account furnished it became patently plain that the bank had charged *ta'widh* not at the rate of 1% per annum but at the IIMM and/or the "r" rate.

[130] With the greatest of respect to the trial judge, she had glossed over and failed to appreciate the gravity of the terms in the cover letter enclosing the cheque when she observed as follows in her judgment:

> 42. In the circumstances, I am of the view that these amount to a compromise or accord and satisfaction which is binding on the parties. The plaintiff is therefore not entitled to re-open the compromise reached between the parties under the terms and conditions of the defendant's letters dated 15.3.2013 and 29.3.2013 and reclaim any part of the *ta'widh* or profit paid to the defendant.
>
> 43. As such, the plaintiff is estopped from making this claim and reclaiming any part of the Settlement Sum paid.

[131] The offers of the bank in their letters of 15 March 2013 and 29 March 2013 were met with a counter-offer of the borrower in its solicitors' letter of 15 April 2013 which cancelled the original offers of the bank and was a fresh offer of the borrower which the bank accepted by receiving and banking in the cheque.

[132] After all a counter-offer cancels the original offer and is itself a fresh offer which the bank may accept or reject and here the bank accepted by receiving and banking in the cheque. Section 7(a) of the Contracts Act 1950 provides as follows:

> 7. Acceptance must be absolute.
>
> In order to convert a proposal into a promise the acceptance must —
>
> (a) be absolute and unqualified;

[133] We need go no further than to quote Prof Visu Sinnadurai, a former High Court Judge in his book *Law of Contract* (4th edn), vol. 1 (LexisNexis) when explaining the ramifications of a counter-offer in the following terms at para 2.19:

> [2.19] Acceptance subject to new terms: counter offer. In certain cases, the courts may consider the purported acceptance that is qualified by the introduction of a new term as a counter offer destroying the original offer. In such cases, where the purported acceptance has been couched in terms suggesting the introduction of a new term, it has been held to be a counter offer. See also the Indian case of *Moolji Jaitha & Co v. Seth Kirodimal* and the English case of *British Road Services v. Arthur V Crutchley & Co*, *Butler Machine Tool Co Ltd v. Ex-Cell O Corp (England) Ltd;* and *Compania de Navegacion Pohing SA v. Sea Tanker Shipping (Pte) Ltd*, *the Buena Trader*.

[134] The learned authors Pollock and Mulla on the *Indian Contract and Specific Relief Acts* (12th edn), vol. 1, Butterworths, 2001 explained absolute and unqualified acceptance at p. 199 in dealing with the provision of s. 7 of the Indian Contract Act of 1872 which are in *pari materia* with ours, as follows:

> A valid acceptance of proposal must be absolute and unconditional. It must extend to all terms of a proposal. *If the purported acceptance is conditional or qualified, it does not create a contractual relationship. It becomes a counter proposal, which may become a contract on the terms offered by the offeree if the proposer accepts it. Such an acceptance would revoke the offer, and the contract cannot be revived on original terms by withdrawing the conditional acceptance.* A bid can be revoked by notice if it has been accepted provisionally or with conditions. (emphasis added)

[135] At p. 202 under the heading "counter-proposal" the learned authors went on to explain:

> An acceptance with a variation in terms of the proposal or with a qualification is a counter-proposal, which must be accepted by the original offerer before a contract is made.

[136] There was no room for estoppel to apply to prevent the borrower from suing for the excess *ta'widh* paid for that right had been categorically carved out, expressly reserved and properly preserved!

[137] It was a compromise that came with a reservation of the borrower's right. It was an accord and satisfaction subject to the reservation of the borrower's right to challenge the correctness of the *ta'widh* charged and to claim for a refund of the excess.

Whether Limitation Should Run From The Date When Full Payment Of The Loan Was Made Subject To The Right To Challenge The Ta'widh Charged

[138] Even assuming for a moment that there was no moratorium in place until the award is delivered, the borrower is within time to bring this action for a refund of the excess *ta'widh* paid as the payment of the settlement sum was subject to the term that the borrower would be contractually allowed to claim for a refund of the excess as may be decided by a court of law.

[139] The bank was fully conscious of and consented to receiving the full settlement sum subject to the limited right of the borrower to challenge the correctness and legality of the amount of *ta'widh* charged. This is not a case of unqualified and unequivocal accord and settlement whichever way one may want to read the terms of settlement found in the cover letter to the cheque for the settlement sum.

[140] The bank could have refused payment and said that they do not agree to the term or qualification set out but by their agreeing to accept the cheque for the settlement sum subject to the term as stated, they cannot now feign ignorance and say that there was full and complete accord and satisfaction.

[141] True, the borrower cannot set aside the whole settlement but that it could dispute the amount of *ta'widh* charged for that right was clearly spelt out. It is not unlike a payment under protest subject to its right to challenge

the legality and amount of *ta'widh* charged. By accepting the payment made there was a fresh contract entered into which gives the borrower the right to challenge the *ta'widh* charged within six years from the date of payment.

[142] That right to sue for a refund of the excess *ta'widh* arose when the payment subject to terms was accepted by the bank. This action for recovery of the excess amount of *ta'widh* paid being made on 23 August 2017 was well within six years from date of the payment made on 30 April 2013.

[143] At any rate the bank admitted at para. 20(e) of the statement of defence that the earliest date they informed the borrower about the *ta'widh* charged and at the rate of 7.23% per annum was on 17 January 2012. (See encl. 9, RR 2A at p. 37 of 177).

[144] The bank had argued that the *ta'widh* had been imposed since 1 March 2008 when it was first charged. However, the statement of accounts and the *ta'widh* at the "r" rate together with the detailed particulars and calculation of the *ta'widh* was not communicated to the borrower.

[145] The borrower would be able to avail itself of the postponement of limitation seeing that the earliest that it could have known of the mistake in the charge of excessive *ta'widh* charge was on 17 January 2012 irrespective of whether the borrower appreciated the import of the *ta'widh* charged then or otherwise. Since the borrower as the plaintiff filed the suit on 23 August 2017 it was well within the limitation period of six years.

[146] Section 29 of the Limitation Act 1953 is applicable where the relevant provision reads as follows:

> Postponement of limitation period in case of fraud or mistake
>
> 29.(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) **the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered** the fraud or **the mistake**, as the case may be, **or could with reasonable diligence have discovered it**: ... (emphasis added)

Pronouncement

[147] Looking at the overall circumstances of this case and the fact that the bank had charged *ta'widh* in excess of what was permitted contractually as per s. 9.32 of the asset sale agreement and further that the payment of the settlement sum of RM42.045 million by the borrower was clearly without

prejudice to their claim for a refund based on the correct amount outstanding, we were constrained to allow the borrower's claim for a refund of the excess *ta'widh* paid.

[148] Indeed as we have stated above, the borrower's claim in the High Court was clearly within limitation, its right to a refund having arisen only at the point when payment was made as required by the bank with finally both parties reserving their rights where the issue of *ta'widh* was concerned and which issue we had finally decided in favour of the borrower.

[149] We had allowed the borrower's/appellant's appeal and ordered the bank to pay back RM5,005,285.79 to the borrower being a full refund of the excess *ta'widh* paid under protest and with full reservation of rights. The decision of High Court was set aside with costs.

[150] The counterclaim of the bank of RM1,000,000 being the discount given for the *ta'widh* charged was consequentially allowed now that the correct *ta'widh* chargeable had been ascertained and ordered to be refunded. We agree with the bank that if any part of the borrower's appeal is allowed then the discount or the partial reduction or waiver of the *ta'widh* ceases to have effect or be binding on the parties.

[151] In respect of the borrower's appeal in Appeal No. 2512 we allowed costs of RM50,000 to the borrower here and below and subject to allocator.

[152] In respect of the bank's appeal in Appeal No. 2522 we made no order as to costs.